

# Interest Analysis Facing Its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability?

## A Postscript to the Symposium

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Moderators at panel discussions rarely have the opportunity of a substantive last word. I will use this opportunity here not to take my revenge, but, as Tribonian's slave, to clean up the detritus from fallen idols and to tidy up important topics for future revisitation. Borrowing freely from the papers in the Symposium, from other writings, and consulting my own muse, I hope to end up, if not with a consensus on, at least with a conspectus of, the main issues. I will then add my own evaluation of interest analysis and propose a specific approach to products liability conflicts. My instrument will be plain and blunt language.

The first need in conflicts law today is "mythoctony": the recognition that certain constructs should be put to rest because their utility is long gone and their specters bedevil our thinking. Let me compose a few fitting epitaphs.

HERE LIES the ordinary process of statutory construction and interpretation. Nobody disputes that the *actual* legislative intent as to the reach of conflicts law is dispositive, within constitutional limits, if it can be ascertained through the time-honored methods that apply to any legal text. Since neither Brainerd Currie nor his successors attempt to prove such intent (in fact, whatever evidence there is tends to support the territorialist thesis),<sup>1</sup> it has become obvious that the intent reconstructed by interest analysis reflects only its conflicts philosophy which should be judged on its own merits. It follows that "construction and interpretation" is a slogan and that "intent" is at best surplusage.

MAY IT REST IN PEACE any notion that the substantive purposes of any law are not ascertainable.<sup>2</sup> To be sure, the search may be arduous and inconclusive, especially for foreign atypical laws, and the purposes discovered may be multiple and contradictory.<sup>3</sup> However, teleology as one of the basic interpretive tools was, is, and always will be key. Before we canonize teleology, however, it is critical to note that its importance is not really the question. The issue here, which is a totally different matter, is whether these substantive purposes will give us a conflicts clue. Since the

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1. Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 467 (1985); Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 424-29 (1980); Davies, *A Legislator's Look at Hague and Choice of Law*, 10 HOFSTRA L. REV. 171, 174-80 (1981); Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 948 (1981). But see R. CRAMPTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 249 (1983).

2. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 33-35 (1984); Trautman, *Reflections on Conflict-of-Laws Methodology: A Dialogue*, 32 HASTINGS L.J. 1612, 1618-19 (1981); Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of That Analysis in Product Liability Cases*, 46 OHIO ST. L.J. 493, 494 (1985).

3. Juenger, *supra* note 2, at 33.

beginning of relevant time, conflicts science examined the nature of the substantive rule, including its purpose, in making a selection of the appropriate connector. This is what the statisticians were all about.<sup>4</sup> The problem has always been that without a superimposed conflicts theory, a substantive purpose will remain a sphinx on its conflicts scope.<sup>5</sup> Something more is needed to generate a state interest or whatever will produce a *conflicts* purpose. To be sure, the new conflicts theories, especially interest analysis, advocate particularism which directs the conflicts inquiry to narrow substantive rules, rather than subjecting entire fields to a single conflicts rule. The guest statute in the field of torts is an example of particularistic conflicts. While this particularism has many adherents,<sup>6</sup> the breadth of the substantive rule seems to have little, if anything, to do with the basic question, that is its conflicts reach. Furthermore, if it were to be established, for example, that all tort law has a certain unity and that it shares a central substantive purpose, then it would not be inappropriate to avoid particularism and seek to effectuate that unity and purpose through a single and general conflicts connector.

In short, interest analysis, being a normative conflicts theory,<sup>7</sup> cannot derive support from legislative intent or substantive purpose. It must seek its justifications elsewhere.

A cenotaph is also needed for such words as "fair," "reasonable," "functional," and "workable" when used to justify a conflicts answer. These notorious question beggers and good-intention signallers should be unmasked and recognized for what they are. In a normative text, they merely invite the decision makers to fill the empty vessel by drawing from some value system. However, they fail to provide the system itself. If the articulation of such a system is not yet possible or desirable, then the decision appears intuitive, spontaneous, or directly flowing from some fountain of justice. Sometimes they also serve the more concrete function of an excluder. For example, a statement that the law favoring the plaintiff should apply unless this would be unreasonable because of the lack of the defendant's contacts with that state,<sup>8</sup> standing alone, does have some meaning because the only exception permitted must be based on reasonableness to the defendant. However, the statement does not tell us what constitutes such reasonableness. Also, it fails to contain its own

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4. See K. LIPSTEIN, *PRINCIPLES OF THE CONFLICT OF LAWS, NATIONAL AND INTERNATIONAL* 29, 37-38 (1981); Juenger, *A Page of History*, 35 *MERCER L. REV.* 419, 424-28 (1984); Kahn-Freund, *General Problems of Private International Law*, 143 *RECUEIL DES COURS* 246 (1974); Yntema, *The Historic Bases of Private International Law*, 2 *AM. J. COMP. L.* 297, 303-04 (1953), reprinted in *AMERICAN ASSOCIATION OF LAW SCHOOLS, SELECTED READINGS ON CONFLICT OF LAWS* 30, 35-36 (1956).

5. LIPSTEIN, *supra* note 4, at 11; Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, *supra* note 1, at 460; Juenger, *What Now?*, 46 *OHIO ST. L.J.* 509, 513 (1985); Juenger, *Choice of Law in Interstate Torts*, 118 *U. PA. L. REV.* 202, 208-11 (1969); Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 *AM. J. COMP. L.* 615 (1979); Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 *COLUM. L. REV.* 459 (1967). But see Weintraub, *Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning*, 35 *MERCER L. REV.* 629, 631-34 (1984). I find Weintraub's attempted linkage unpersuasive.

6. Peterson, *Particularism in the Conflict of Laws*, 10 *HOFSTRA L. REV.* 973 (1982).

7. Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, *supra* note 1, at 497; Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 1, at 392-93.

8. R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 346 (2d ed. 1980).

justification. I have dwelt elsewhere on the bootstrapping nature of standards such as "justified expectations of the parties,"<sup>9</sup> and the same analysis applies here as well.

Claims that interest analysis works and challenges to prove otherwise<sup>10</sup> cannot be addressed without first setting up the criteria by which results are to be evaluated. A showing, for example, that the courts now conducting interest analysis always choose, in tort cases, the law of the common domicile of the parties over the territorial law of the events establishes only the occurrence of this result, not its merit. The wisdom of this choice must derive from somewhere else, such as from the separate justification of the common-domicile connector. Its practicality must be calculated under a cost-benefit analysis using known values.

We must also accept the simple notion that concepts such as true and false conflicts, the unprovided-for case, and the disinterested forum have no life of their own but exist only in the subjective universe of interest analysis. They are devices animated by the spirits of such analysis and have no magic for the disbeliever.

Finally, it is with sincere regret that we report the nonexistence in the world of conflicts of any substantive super law<sup>11</sup> (national consensus law, better law, modern law) applicable to multistate cases. Before this is challenged, consider these words of consolation. There is indeed a life for this super law, but in another world, on the planet of unification. Perhaps my view of the scope of choice of law is too narrow, but I include within it principally those situations where at least two senses of justice, as crystallized in differing substantive rules of equal standing, are potentially applicable. In many areas of the law, even in the field of torts (products liability, defamation), states and nations have different perceptions on where to draw the line of justice. This is likely to continue for the indefinite future. The struggle, then, is not between good and evil, but between at least two goods or two lesser evils. By what authority and on what kind of reason other than pure subjective preference can a judge select one of these senses of justice over that which prevails in his own state?

As a student of comparative law, I am quite skeptical about claims that any particular sense of justice is better than any other,<sup>12</sup> and I envisage enormous practical

9. Kozyris, *Justified Party Expectations in Choice-of-Law and Jurisdiction: Constitutional Significance or Bootstrapping?*, 19 SAN DIEGO L. REV. 313-39 (1982).

10. See, e.g., Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack"*, 46 OHIO ST. L.J. 483 (1985); Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, 34 MERCER L. REV. 593, 604-05 (1983). Such claims lack an Archimedean Point on which to support any evaluation.

11. Professor Juenger is now the principal advocate of this concept. See Juenger, *What Now?*, *supra* note 5, at 517, 521-23 and references cited therein.

12. Two recent back-to-back products liability cases involving a single insurance issue in the celebrated asbestos and D.E.S. controversies vividly illustrate this point. In *Acands v. Aetna Cas. & Sur. Co.*, 764 F.2d 968 (3d Cir. 1985), an installer of asbestos products, who had been made a defendant in thousands of lawsuits, sued his insurers for a declaratory judgment on how coverage was triggered. The key question related to the interpretation in the policies of the word "bodily injury." In the context of disease, does the phrase mean the manifestation of disease, the exposure to the harmful agent, or the continuing injury from exposure to manifestation? Or perhaps an injury in fact approach or a strict contextual interpretation should be used? The court accepted the third meaning on a strict construction against the insurer and a pro-coverage rationale. Incidentally, the same question arises for purposes of the commencement of the statute of limitations. On the conflicts side, the court applied Pennsylvania law and rejected a last minute attempt by one of the parties to introduce California law supporting the second interpretation. *Id.* at 971, n.3.

The identical issue was raised in *Eli Lilly & Co. v. Home Ins. Co.*, 764 F.2d 876 (D.C. Cir. 1985) for the D.E.S. injuries. In this case, the conflicts question was presented vigorously and in a timely manner. Three states were potentially

problems were the courts to replace the process of selecting the applicable law with an open-ended pursuit of subjective preferences. A judicial effort to identify on an ad hoc basis the areas where a consensus law is developing or appropriate, and then to ascertain its particular content, is apt to lead to intolerable confusion and diffusion while yielding meager results. In an environment of ethnocentric courts and complex and diverse multistate transactions, what is more likely to happen is that, following their natural instincts, the judges will almost always choose their own law. This approach will end up being a surrogate for the *lex fori*.

The United States Congress could federalize some or all of interstate or United States' international private law. Alternatively, in a manner resembling the development of *jus gentium* in the later Roman system within a single jurisdiction,<sup>13</sup> a federal common law could emerge in diversity cases in the federal courts as was being done under *Swift v. Tyson*<sup>14</sup> before the door was hermetically sealed by *Erie Railroad v. Tompkins*.<sup>15</sup> In the international field, the recently completed United Nations Convention on Contracts for the International Sale of Goods<sup>16</sup> furnishes a good example. However, there is a difference between making law and finding the law. Currie had a point when he said that making substantive legislative choices involves a highly political function which exceeds the power of domestic courts.<sup>17</sup>

In conclusion, despite its noble intentions, the super law solution should be relegated to a minor conflicts niche to operate interstitially only where the relevant contacts are so dispersed that no single law may be plausibly chosen as, for example, in the Agent Orange case.<sup>18</sup>

Now that we have buried our corpses, let us turn to the real controversies, starting with the central concept of governmental interest. Whether states have significant interests in the outcome of private law litigation is itself a questionable proposition,<sup>19</sup> but the problem is even more fundamental. What is the reason that, in

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interested: Indiana, New York, and Pennsylvania. Since there was a conflict at least between Pennsylvania law (multiple trigger) and New York law (manifestation or injury in fact), the court proceeded to determine which jurisdiction had the "more substantial interest." *Id.* at 882. The negotiations and the agreements on the policies had been connected with all three states, and the court broke the tie by choosing the substantive law of Indiana where the insured was incorporated and had its principal place of business, even though the insured opposed this choice. The court was not persuaded that the Indiana courts would follow a pro-insured stance like Pennsylvania and proceeded to certify to the Indiana Supreme Court the issue of the importance of extrinsic evidence as to the intent of the parties.

It is quite clear that the courts have been split at least five ways in deciding this mundane but crucial issue. I cannot see how one can designate one or more of these methods as better or more modern than any other. To be sure, a pro-compensation position would favor the multiple-trigger concept, but, in the context of the cost-benefit analysis suggested below, *see infra* pp. 481-82, I see no way of deciding, as a matter of conflicts law, whether this is more or less just than any one of the others. Lest we forget, in *Cousins v. Instrument Flyers*, 44 N.Y.2d 698, 376 N.E.2d 914, 405 N.Y.S.2d 441 (1978), the New York Court of Appeals, in its most recent pronouncement on products liability conflicts, labelled a rule incongruous that plaintiffs should be permitted to choose the most favorable applicable law, even if this is done within narrow limits.

13. Juenger, *supra* note 4, at 422-23.

14. 35 U.S. (16 Pet.) 1 (1842).

15. 304 U.S. 64 (1938).

16. This Convention was adopted at a United Nations Conference of Plenipotentiaries held in Vienna in 1980. For the text, see U.N. Doc. A/CONF.97/18, ANN. I, reprinted in 19 I.L.M. 668 (1980).

17. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 182, 272 (1963).

18. In re "Agent Orange" Product Liability Litigation, 580 F. Supp. 690 (E.D.N.Y. 1984).

19. D. CAVERS, THE CHOICE OF LAW PROCESS 98-102 (1965); A. SHAPIRA, THE INTEREST APPROACH TO CHOICE OF LAW 64-67 (1970); Ehrenzweig, *Choice of Law: Current Doctrine and "True Rules"*, 49 CALIF. L. REV. 240, 246-47 (1961);

conflicts, we should be urging the states to pursue their interests? Are not they doing it on their own anyway? Officious intermeddling without interest is a rarity in conflicts, and restraining it should not be worth much.<sup>20</sup> If interest analysis had stayed where it started, as a minor due process doctrine, then it hardly would have been noticed or controversial.

Perhaps the emphasis on interest serves the function of negating other imperatives such as the traditional ones of vested rights and comity. But what about positive content? If each state is left free to determine what its interests are and where they lie, is not the logical consequence of interest analysis its own self-destruction as a choice of law theory since the issue then will become only a matter of the will and power of each state? Interest analysis, however, in fact goes beyond a mere description of state preferences. Its conflicts values revolve around the home connection and the forum preference, and its methodology of assessing state interests on a case-by-case, issue-by-issue basis is often nothing but a cover for the relentless pursuit of these two values.

Currie's writings, and on this there is no disagreement among his successors, reveal a pervasive belief that states are and should be more interested in their people (citizens, domiciliaries, residents) than in events or actions within their territory.<sup>21</sup> The personalism-versus-territorialism debate is as old as they come.<sup>22</sup> Story himself, the American grandfather of conflicts, recognized the importance of the personality factor;<sup>23</sup> the question being not one of relevance, but of proper balance and proportion. The primacy of the home connection as against the events or property locale, as advocated by interest analysis, is anything but self-evident. That states are interested in or have decided to legislate with regard to persons rather than events or property remains a bold but naked assertion which is supported neither by historical data nor by compelling logic. In fact, at least in the past, legislatures have been territorially oriented, and this trend has not been reversed in recent times despite the assaults of interest analysis.<sup>24</sup> This was evident in the choice of law provisions of the new statutes for no-fault automobile reparations.<sup>25</sup> Furthermore, reliance on the personality factor

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Juenger, *supra* note 2, at 30; Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 180-207 (1964); Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 664 (1962); Trautman, *supra* note 2, at 1614.

20. Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, *supra* note 1, at 475; Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 1, at 393-402.

21. See, e.g., B. CURRIE, *supra* note 17, at 85-87, 114-16. See also, Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, *supra* note 1, at 462-68; Juenger, *supra* note 2, at 9-10, 39; Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595, 620-21 (1984).

22. The very classification of laws by the medieval statisticians into "real" (applicable within the territory) and "personal" (following the citizen or resident) demonstrates awareness and use of this distinction. See Juenger, *supra* note 4, at 419, 426-27, 454-56; Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375 (1919). The relevance of the personal connection has been debated in continental conflicts for centuries. See Audit, *A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles*, 27 AM. J. COMP. L. 589, 591-93 (1979); Juenger, *Comment*, 27 AM. J. COMP. L. 609 (1979); Nadelmann, *Internationales Privatrecht: A Source Book on Conflicts Theory Analyzed and Reviewed*, 17 HARV. INT'L L.J. 657 (1976). In the United States, J. Beale, the principal theorist of traditional conflicts, considered and downgraded but did not exclude the notion of a personal law. 2 J. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* 1929 (1945); 3 J. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* 1947 (1935).

23. See J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* §§ 181, 201 (1841) which discusses the applicability of the law based on the residence of the parties.

24. See *supra* note 1 and accompanying text.

25. Kozyris, *No-Fault Automobile Insurance and the Conflict of Laws—Cutting the Gordian Knot Home-Style*,

can produce intractable problems. In a territorial system, the significant events of a multistate transaction can be localized in one state often enough so that the parties have a common connection there. To be sure, what is significant may be controversial, like the resulting harm or conduct in torts, or the making or its performance in contracts. However, the case against the territorial system on this point has been vastly overstated because in the normal situation an acceptable, if imperfect, localization can be made. Also, in a personal system, when all the parties are from the same state, the common connection is strong and the choice is often easy. Yet when they come from different states, we face an impasse. The parties share no connecting factor and, given that the interests of states in their own people are presumably of equal weight, the application of one of the two laws would sacrifice an equally authoritative law.

Some interest analysts use different terminology urging us to go then to the law of the place of social impact. If the impact approach were to be taken seriously rather than as a euphemism for the plaintiff's home state,<sup>26</sup> we would be faced again with an equally insoluble problem, because, however it is sliced, what is given to the plaintiff must be taken from the defendant. When the loss is shifted to the defendant, there must be a commensurate negative impact in his home state, and thus there is encountered the original impasse of whose home state is more equal than the other's.<sup>27</sup> In addition, seeking to localize impact and consequences uses the processes of the traditional conflicts methods while it lacks the relative certainty and ease of application of such methods.

Incidentally, another way to come out in favor of the plaintiff, quite unorthodox by Currie's standards, is to introduce the principle of compensation: breaking the split-domicile tie in favor of spreading, rather than concentrating, losses.<sup>28</sup> In this realm of substantive policies which determines conflicts choices (compensation in torts, validation in agreements),<sup>29</sup> we have at least articulated the real basis of the choice.

The additional fact that interest analysis uses the home connection not neutrally, blindly, or bilaterally, and that it does not apply the *lex domicilii* of the tort victim regardless of its content or whether the victim is a domiciliary of the forum, makes matters even worse. If this reduces to the notion that states are interested in applying

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1972 DUKE L.J. 331; Kozytis, *No-Fault Insurance and the Conflict of Laws—An Interim Update*, 1973 DUKE L.J. 1009. For the limited exceptions to the territoriality principle in workmen's compensation law, see *Roadway Express v. Warren*, 163 Ga. App. 759, 760, 295 S.E.2d 743, 744-45 (1982).

Further evidence of the territorialist orientation of legislators is provided by the Uniform Securities Act of 1985, approved by the National Conference of Commissioners on Uniform State Laws on August 2-9, 1985, CCH, Blue Sky Law Reports, Extra Edition No. 748 (August 27, 1985). Sections 801(a) and (b), the key texts on scope, provide that the Act applies if a sale or purchase of a security, or an offer therefore, is "made in this State" or, in certain contexts, is "made and accepted in this State." Further, Section 802(b), invalidating contractual waivers of compliance with the Act, applies to contracts "entered into or effective in this State."

26. See, e.g., Weintraub, *supra* note 2, at 495, 501; Weintraub, *supra* note 5, at 631, 643.

27. Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, *supra* note 1, at 471, 476.

28. The most ardent advocate of this principle on its own merits is Professor Weintraub. See R. WEINTRAUB, *supra* note 8. However, the "modern super law" people reach the same result by arguing that compensation represents the current trend. See Juenger, *What Now?*, *supra* note 5, at 522-24.

29. Validation is more defensible than compensation, however, because it presumably effectuates the intention of the parties, which is an independent consideration of substantial importance in choice of law.

their protective laws only in favor of their own people and their burdensome laws only against nonresidents, the resulting blatant discrimination not only is unwise, but would violate constitutional standards, especially the privileges and immunities clause.<sup>30</sup> Currie's position on this issue is Delphic if not apocryphal, and it is gratifying that at least some interest analysts expressly disclaim any intent to prejudice the nonresidents.<sup>31</sup> However, even under the best of circumstances and with the best of intentions, the emphasis on both the *lex domicilii* and the *lex fori* in the context of plaintiff's wide choice of fora all too often will bring about such a result and we cannot close our eyes to it.

Equally objectionable is the intimation that states should so calibrate their choice of law that they derive selfish, usually pecuniary, extraneous benefits from it by

30. See Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 888-904 (1983); Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379 (1979). Sedler's attempted justification is unpersuasive. See Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, *supra* note 10, at 620-35. See also *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 327 (1981) (Stevens, J., concurring).

With regard to full faith and credit and due process, the Supreme Court has downgraded their importance as sources of constitutional limitations on state excesses in choice of law in a line of cases culminating in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981). The Court accomplished this by applying the generally accepted rule that any state which has a significant contact or aggregation of contacts with the parties or the transaction generating state interests may choose its law in such a manner that any minimal contacts would suffice. See Kozyris, *Reflections on Allstate—The Lessening of Due Process in Choice of Law*, 14 U.C.D. L. REV. 889 (1981).

An important case just handed down, however, raises the hope that the tolerance of the Supreme Court is not without limits. In *Shutts v. Phillips Petroleum Co.*, 679 P.2d 1159, 1181 (Kan. 1984), after ruling that the law of the forum applies unless compelling reasons exist for choosing a different law, the Supreme Court of Kansas proceeded to apply Kansas law to the claims of all the members of a plaintiff class action relating to the measure of damages to be used to compensate them for the unjust enrichment derived by the defendants from the use of their monies. This was done even though most of the plaintiffs were nonresidents and their claims arose from leases executed out of state and relating to foreign properties. The court explained that the plaintiffs adequately represented the class, that all those who had not opted out of the class had thus manifested their desire to have Kansas law apply, that the forum had a significant legitimate interest in adjudicating all claims, and that a uniform measure of damages was desirable due to the common fund nature of the lawsuit. The United States Supreme Court disagreed and reversed in *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965 (1985). Writing for the majority, Justice Rehnquist was not persuaded that a common fund existed and gave little credence to the idea that the consent of the members of the class implied in their not opting out was relevant to the validity of the choice of Kansas law. Finding that Kansas lacked interest in claims unrelated to it, that out of state plaintiffs had not expected the application of Kansas law to their transactions, and that such law conflicted with the law of Texas and other jurisdictions having major connections with such claims, Justice Rehnquist concluded that the application of Kansas law to all the claims was arbitrary and unfair so as to be unconstitutional. *Id.* at 2979-81.

The case is of further interest for a number of other reasons. First, the major presence and activities of the defendant Phillips Petroleum in Kansas apparently were insufficient to support the application of Kansas law to all these claims. *Id.* at 2979, 2981, *citing* *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930). Thus, the window left open in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320, n.29 (1981) for the possible application of law based solely on the domicile or place of business of the defendant is now apparently closed. Second, the Court expressly held that the rule calling for application of the *lex fori* unless compelling reasons exist for applying a different law is unconstitutional *per se*. *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965, 2981 (1985). If this is to be taken seriously, then the very foundations of interest analysis are in jeopardy! Justice Stevens, dissenting, argued that the compelling reason language had created a misperception of the holding of the Kansas court. *Id.* at 2981. Finding that the application of Kansas law had not impaired the legitimate interests of any other state because there was no real difference in the potentially applicable laws, Justice Stevens took the position that it was unnecessary to consider the status of the Kansas commitment to the *lex fori*. *Id.* at 2986-92.

31. For Currie's views on the problem of discrimination, see Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960); Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960); That interest analysis is not Improperly discriminatory has been argued by Sedler. See Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, *supra* note 10, at 629-35.

lightening their welfare burden.<sup>32</sup> Conflicts is not a branch of taxation. This is not to say that a state may not adopt a victim compensation system which reduces welfare expenses in general, or that it may not apply such a system to all situations having an appropriate connection to it. However, such a connection is a precondition that must be met. If the domicile of the parties is the connection used, then due (equal?) deference must be given to the compensation schemes of the states of the domicile of all the affected parties.

The other fundamental normative preference of interest analysis embraces the *lex fori* in all true conflicts.<sup>33</sup> While favoring local law has some basic primitive appeal ("my courts apply my law") and produces certainty, its wisdom has been debated for ages. The litmus test of the even-handedness of any conflicts approach is precisely its position on the question of whether comity and mutual self-limitation, or go-it-alone and beggar-thy-neighbor, should predominate.

In discussing this aspect of interest analysis, I will assume, although it is not entirely clear, that it concedes that a state has no special interest in maximizing the application of its private law just because it is its own. On the other hand, because of the practical reasons of convenience and familiarity, and because local law is the starting point to be applied unless displaced, even in the most forum-neutral conflicts system, it is accepted that in borderline cases the doubts ought to be resolved in favor of the *lex fori*. Interest analysis, however, goes far beyond using the *lex fori* as a residual tie-breaker. Currie's main thesis was that whenever the forum has any measurable interest in the matter, its law should inexorably apply regardless of the importance of the contacts with and the interests and concerns of any other state.<sup>34</sup> The rejection of any balancing and mutuality purportedly derives from Currie's restricted view of the judicial function. According to Currie, it is not for the courts to choose comity over their own law. One could also detect his negativism toward a cooperative effort in conflicts at all levels.<sup>35</sup>

From the perspective of results, given the self-serving fluidity with which litigants and courts can conjure up some local concern, Currie makes the *lex fori* the supreme law of conflicts. This position is quite extreme. Even as dedicated a *lex fori* champion as Professor Albert Ehrenzweig is more restrained than Currie, by aiming at clarity and certainty rather than celebrating provincialism. He combines the *lex fori* with a few forum-neutral hard and fast true rules of conflicts. In addition, he further mitigates the reach of the *lex fori* by relying on tighter jurisdictional rules ("proper

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32. Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, *supra* note 1, at 470-71; Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 1, at 411-17; Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and A Reformulation*, 25 UCLA L. REV. 181, 201-03 (1977).

33. B. CURRIE, *supra* note 17, at 119, 163. See also, Symeonides, *Revolution and Counterrevolution in American Conflicts Law: Is There a Middle Ground?* 46 OHIO ST. L.J. 555 (1985).

34. B. CURRIE, *supra* note 17, at 186. See also Symeonides, *supra* note 33, at 566. For an even more extreme pro-forum orientation, see Weinberg, *supra* note 21, at 595. For the doubts now raised by the *Shutts* case on the very constitutionality of the pure and naked *lex fori*, see *supra* note 30.

35. B. CURRIE, *supra* note 17, at 52, 170, 180, 183. See also Allo, *Methods and Objectives in the Conflict of Laws: A Response*, 35 MERCER L. REV. 565, 574 (1984); Sedler, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1628, 1636 (1981); Symeonides, *supra* note 33, at 551-52.



law in a proper forum'') to eliminate cases having no significant connection with the forum.<sup>36</sup>

It should also be noted that, since it is the plaintiff who ordinarily chooses the forum, *lex fori* easily reduces to *lex actoris*, or in other words, the law of plaintiff's choosing. What happens then to Currie's opposition to substantive objectives such as validation or compensation? In any event, I remain mystified as to why plaintiffs as such should be given a conflicts bonus which can be so readily abused in our world of easy judicial jurisdiction. Would interest analysis remain faithful to the *lex fori* if defendants were allowed to bring declaratory actions of nonliability?

Interest analysis is severely split on the pro-forum bias. The majority of its modern adherents, as well as its judicial practitioners, reject the automatic prevalence of the *lex fori* in true conflicts, preferring to engage in some balancing, weighing, or comparative-impairment evaluation of the interests of all concerned states.<sup>37</sup>

This Postscript is not the place to further debate the *lex fori*. It suffices to say that interest analysis has done a disservice to federalism and internationalism by relentlessly pushing a viewpoint which inevitably leads to conflicts chauvinism<sup>38</sup> or, more accurately, tribalism in view of the emphasis on the nation being a group of people. Any approach which is based on maximum use of power for one's own selfish interest is not only antithetical to the very *raison d'être* of conflicts which is to seek the law most suitable to a multistate controversy, but also is bound to become self-defeating by inviting retaliation and by reducing the benefits of affirmative cooperation. The glorification of the *lex fori* is particularly deplorable when considered in the context of our long history of legislative and judicial benevolent acquiescence in, if not outright adoption of, a forum-neutral system of conflicts.<sup>39</sup> If the Restatement of Foreign Relations Law of the United States can afford to limit the reach of the United States' regulatory law in the international sphere to reflect reasonableness and respect for the authority of other nations,<sup>40</sup> should not the reach of state private law within our federal system be so limited?

Finally, I would like to say a few words about the ad hoc methodology developed by Currie and cultivated by his successors. This methodology does away with conflicts rules and requires a separate analysis in each and every case and a

36. A. EHRENZWEIG, *CONFLICT OF LAWS* 350 (1962). For a good summary analysis of Ehrenzweig's views, see E. SCOLES & P. HAY, *CONFLICT OF LAWS* 20-23 (1982).

37. See E. SCOLES & P. HAY, *supra* note 36, at 24-27; Symeonides, *supra* note 33, at 565.

38. Baxter, *Choice of Law and the Federal System*, 16 *STAN. L. REV.* 1, 10-11 (1963); Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, *supra* note 1, at 475-76; Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 1, at 408-10; Evrigenis, *Interest Analysis From a Continental Perspective*, 46 *OHIO ST. L.J.* 526 (1985); McDougal, *Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law Problems Concerning Contributory and Comparative Negligence*, 26 *UCLA L. REV.* 439, 447-56 (1979); Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 *HOFSTRA L. REV.* 149, 150-53 (1981); Von Mehren & Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 *HOFSTRA L. REV.* 35, 48-55 (1981).

39. Both Restatements of Conflicts are basically forum-neutral. See *RESTATEMENT OF CONFLICTS OF LAW* (1934); *RESTATEMENT (SECOND) OF CONFLICTS OF LAW* (1971). This means the applicable law is chosen regardless of where the forum is located. I am not aware of any piece of substantive legislation which explicitly makes its application depend on the forum.

40. *RESTATEMENT (SECOND) OF CONFLICTS OF LAW*, § 403 (Tent. Draft No.6, 1985). See also Comment, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 *HARV. L. REV.* 1310-30 (1985).

custom-made answer to every choice of law question.<sup>41</sup> While its beginnings may be traceable to the antiformalism of realist jurisprudence, reflecting the rule-skepticism of its most prominent intellectual forebear, Professor Walter Wheeler Cook,<sup>42</sup> this methodology has developed into a different kind of an animal. Its focus is not really on how conflicts rules work in practice, or on their actual social impact, but on its own countersystem of abstract normative preferences. Consequently, its modernism is mostly rhetorical.

The ad hoc aspect of interest analysis reflects a philosophical position which rejects strict and specific rules (judicial compulsion) in favor of equitable broad standards (judicial discretion), and which eschews abstract commands interpreted deductively (code method) in preference for case-by-case holdings extended inductively (common law method). However, nowhere in interest analysis is there a recognition of the fact that this position is controversial and debatable. Nor is there any attempt to defend it or explain why it is particularly suited for conflicts. This is just another of the axioms that one must add to the interest analysis baggage.

Even a casual perusal of conflicts developments in recent years will show clearly that the cost of the special brand of casuistic "khadi-justiz" (ad hoc decisions deduced from mystical references to interests) called interest analysis has been quite prohibitive. Conflicts has become a tale of a thousand-and-one-cases. When a new case comes down, interest analysts rush to co-opt it, not by arguing that it is the best or the most acceptable, but by rejoicing in that it is supportable and not totally wrong.

Collapsing the conflicts inquiry into the quest for substantive justice, thus confusing questions of power and authority with those of substantive results, and pursuing the holy grail through a self-centered policy analysis compounds the mess. Efforts to make some order out of all this have produced an incredibly voluminous and complex literature.<sup>43</sup> Any attempt to synthesize this literature must live in the shadow

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41. B. CURRIE, *supra* note 17, at 180-85, 295. See also Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 KY. L.J. 27, 82-87 (1967); Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 108 (1981). For the jurisprudential problems of ad hoc methodology, see Kegel, *supra* note 19, at 91; Loussouarn, *Cours General de Droit International Prive*, 139 RECUEIL DES COURS 271, 338, 342 (1973); Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws*, 28 LAW & CONTEMP. PROBS. 795, 802 (1963).

42. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924), reprinted in AMERICAN ASSOCIATION OF LAW SCHOOLS, *SELECTED READINGS ON CONFLICT OF LAWS* 71, 95-96 (1956); Cook, *An Unpublished Chapter of the Logical and Legal Bases of Conflict of Laws*, 37 ILL. L. REV. 418 (1943), reprinted in AMERICAN ASSOCIATION OF LAW SCHOOLS, *SELECTED READINGS ON CONFLICT OF LAWS* 97-100 (1956).

43. See, e.g., Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983). This is a 72-page heavily footnoted and rather inconclusive article by a leading adherent of interest analysis. The two most recent opinions from the highest courts of New York and California, the most activist courts in conflicts, are not particularly helpful in clearing up the confusion. In *Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985), the parents of sexually-abused children sued two charitable organizations (Boy Scouts and the Franciscan Brothers) for damages on a theory of negligent hiring and supervision. The crucial issue was charitable immunity. Plaintiffs' personal connections were with New Jersey. Most of the wrongful acts, however, took place in New York. Boy Scouts, a federally-chartered corporation, had its headquarters in New Jersey at the time. The Franciscan Brothers were incorporated in Ohio and deemed domiciled there. New Jersey had a charitable immunity statute, and Ohio recognized a similar doctrine subject to the exception of negligent hiring and supervision. However, New York had abolished charitable immunity altogether. Following a summary review of the conflicts developments in New York in the 1960s and 1970s which led to the adoption of interest analysis in choice of law for torts, the Court of Appeals stated that the only really interested states in tort actions are the states where the wrong occurred and the states where the parties are domiciled. Old precedent was then cited to the effect that a wrong is deemed to occur at the place of injury, not at the

place of conduct. The injuries sustained had been divided between New York and New Jersey, and the court proceeded to analyze them separately. With respect to the New Jersey injuries, it was decided without much discussion that being only the forum and conduct state, New York had no interest in applying its loss-distribution rules pertaining to charitable immunity to claims involving non-domiciliaries. For the New York injuries, the situation was characterized as similar to that in *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). Under the reasoning of that case, as reinforced by the first rule for guest statute conflicts enunciated in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), the law of New Jersey, where both the plaintiff and Boy Scouts were domiciled, should govern at least the claims against Boy Scouts. Because the fact-law pattern was the reverse of *Babcock*, however, the court considered all possible reasons for the application of its own forum-locus law. The medical-creditor-protection and the public-ward-prevention rationales of the forum-locus choice were found weak because they were biased in favor of recovery and they were not particularly pertinent in the factual context of the case. The deterrence or conduct-regulating rationale was rejected as not relevant to loss-allocating rules involving foreign domiciliaries. On the contrary, application of the common-domicile law was found to be good because it avoided forum shopping, was content and forum neutral, invited reciprocity and mutuality, and promoted predictability and ease of application. Under this analysis, the court applied New Jersey law to bar the claims against Boy Scouts. This analysis also extended to the claims against the Franciscan Brothers, despite the third *Neumeier* rule which called for the application of the locus law in split-domicile cases, because the Franciscan Brothers had a significant connection with New Jersey where they engaged in substantial charitable activities, but had no connection with New York and would not have expected its law to apply.

In a fascinating opinion, the lone dissenter, Justice Jasen, drew from both interest analysis and the traditional *lex loci delicti* doctrine in arguing for application of New York law to both sets of claims. The interests of New Jersey were downgraded because the Franciscan Brothers never and Boy Scouts no longer were domiciled there, while the interests of New York were found to be real and significant because the nonimmunity rule has a substantial deterrent purpose. Furthermore, New York had an interest in insuring that justice was done to nondomiciliaries who came to the state for a stay and suffered injury there, and treating them differently than their domiciliaries was unduly discriminatory. Finally, Justice Jasen cited *Cousins v. Instrument Flyers*, 44 N.Y.2d 698, 376 N.E.2d 914, 405 N.Y.S.2d 441 (1978) for the proposition that the *lex loci* remains the general rule in New York and is to be displaced only in extraordinary circumstances. Justice Jasen sought to reconcile the *lex loci* with interest analysis by arguing that it is still acknowledged almost universally as a central factor in determining the state in which the significant interests lie. While attacking the majority's reference to fictional party expectations as to the applicable law as irrelevant in New York, the dissenting justice concluded that, in any event, parties normally expect the *lex loci* to apply.

The result in *Schultz* is defensible on almost any conflicts theory, but the reasoning of the court contains many elements that deserve special attention: the recognition by the majority of the importance of the unbiased common-domicile factor over the trumped-up pro-recovery interests of the locus discovered by interest analysis purists; the emphasis upon forum and recovery neutrality; the ambivalent stance of both the majority and the dissent on the significance of party expectations; the acceptance by the dissenter, a clear advocate of interest analysis, of the presumptive prevalence of the *lex loci* in New York; and the dissenter's reference to the necessity of giving New York-type justice to nondomiciliaries. All in all, it is rather obvious that both the majority and the dissent mixed their doctrines to such an extent, juxtaposing irreconcilable principles and doctrines, that the doubts as to where New York stands in matters of conflicts have been compounded.

California's most recent case, *Wong v. Tenneco*, 216 Cal. Rptr. 412 (1985), does not deserve any higher marks and "does violence to basic principles of conflicts developed over the years by experts in the field." *Id.* at 424 (Mosk, J., dissenting). The case involved claims relating to a contract made in California between the plaintiff, a California citizen, and a California corporation for the exclusive marketing by the latter in California of produce coming from Mexico. At the request and for the benefit of defendant, plaintiff had also executed a promissory note in California secured by a deed of trust on California property. When defendant decided to pay the sums due under the contract to the actual growers of the produce in Mexico rather than to plaintiff who controlled the Mexican properties through leases held by his Mexican agents, on the theory that plaintiff as a United States citizen could not lawfully acquire control of land in Mexico, plaintiff sued for breach of contract, negligence, conversion, and intentional interference with business relations. All the claims were based on defendant's actions in California. Nevertheless, the California Supreme Court applied Mexican law and rejected plaintiff's claims as originating in an illegal transaction. Citing ancient precedent, the court invoked a doctrine of "comity" whereby "the forum state will generally apply the substantive law of a foreign sovereign to causes of action which arise there." *Id.* at 417. Characterizing the question as involving an issue of property law, the court stated that "it is a fundamental principle of the law of conflicts that questions relating to control of real property are to be determined by the law of the jurisdiction in which the property is located." *Id.* at 419. Paying lip service to interest analysis, which is supposed to be the prevailing conflicts doctrine in California, the court explained in a footnote that this was a false conflict case because only Mexico had a legitimate interest in the application of its law. *Id.* at 419, n.13.

The sole dissenter invoked the same doctrine, but reached exactly the opposite conclusion. He agreed that the conflict was false, but only because California, not Mexico, had overwhelming interests. Whether or not plaintiff's methods of land control in Mexico were legal, the issues involved contracts made and torts committed in California relating to products marketed there and to loans made there and secured by local land. Application of Mexican law completely impaired California's interests in compensation, punishment, and deterrence. On the other hand, application of California law

of Currie's antirule homilies. Judges, who at first were flattered and enticed by the invitation to freewheeling decision making, are becoming increasingly disoriented in the process of trying to button down policies, contacts, interests, and all that is in between.<sup>44</sup>

These methodological complications are more serious in a field such as conflicts where the crucial issue involving allocation of power (jurisdiction) is preliminary to the resolution of the substantive controversy. The need for clarity and certainty is the greatest in this preliminary stage, and any system calling for open-ended and endless soul-searching on a case-by-case basis carries a high burden of persuasion. With centuries of experience and doctrinal elaboration behind us, we hardly need more lab testing and narrow findings. Rather, we need to make up our minds and make some sense out of the chaos. This is not to say that conflicts rules may not be improved by reducing the generality of their scope, where indicated, or by opening up the realm of relevant contacts and upgrading the status of the personal contacts where appropriate. However, going over to a world of judicial particularistic intuitionism,<sup>45</sup> as called for by the conflicts antiruleists, is quite another matter. In my jurisprudential universe, fixed but revisable rules which lead to good results in the overwhelming majority of the cases, and which are supplemented by some general corrective principles to mitigate injustice in the remaining cases, are superior to, and incredibly more efficient than, a system in which each case is decided as if it were unique and of first impression.<sup>46</sup> This is even more applicable to conflicts.

In short, Currie, surely a master craftsman,<sup>47</sup> endowed with high reason and broad vision, may have been right in many of his insights: that conflicts is a game of power and authority; that people sometimes matter more than events; and that considerations such as better law and party expectations as to the applicable law are inappropriate. Furthermore, Currie's system, with its emphasis on the primacy of the *lex fori* to govern in all true conflicts, had a certain internal consistency and practicality which is seriously compromised in the more recent balancing-oriented versions of his theories.<sup>48</sup> However, while the judgment of history is still ahead of us, looking at the total picture in terms of practical solutions, my current scoresheet

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would not have affected Mexico's interests because the defendant was a non-Mexican entity which, in any event, knew the nature of plaintiff's holdings. *Id.* at 423-24 (Mosk, J., dissenting).

Even the most broad-minded interest analyst will find the reasoning in the *Wong* majority opinion perplexing, disappointing, and not easily dismissable as resulting from a mischaracterization of the issue (property v. contract and tort) or from the unsavory reputation of the plaintiff.

44. Juenger, *supra* note 2, at 26-28.

45. B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 38 (1984).

46. On the importance of reasonable regularity (not certainty) in the law, see K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 215 (1960). See also the scathing attack of Judge Gros of the International Court of Justice upon the reliance on what is equitable to delimit the continental shelf of nations, which is

no longer a decision based on law but an appraisal of the expediency of a result, which is the very definition of arbitrary . . . an equity beyond the law, detached from any established rules based solely on whatever each group of judges seized of a case declares itself able and free to appreciate in accordance with its political or economic views of the moment.

*Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. U.S.), 1984 I.C.J. Rep. 246, (Gros, J., dissenting).

47. Weintraub, *supra* note 2, at 493.

48. Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, *supra* note 1, at 462, 470.

shows a few hits (reconsideration of fundamental premises and system, restoration of personal connections) and many misses (fostering parochial and selfish approaches, overstating the existence of governmental interests in the private law sphere, catering to domiciliary plaintiffs, employing a talismanic and cumbersome methodology).

Emerging from the thicket of doctrinal discussion, it is with relief and hope that we make the transition to a more ordered universe of the current concepts for choice of law in products liability. These include the specific proposals of Professor Russell Weintraub<sup>49</sup> and Friedrich Juenger,<sup>50</sup> as well as the Hague Convention,<sup>51</sup> the Cavers Principle of Preference,<sup>52</sup> and the recent Swiss Draft.<sup>53</sup>

It is my distinct pleasure to state that all these proposals appear sufficiently precise and revealing of their conflicts philosophy to enable us to engage in a rational and fruitful evaluation. The focal point of these comments will be those rules of law which shift personal injury losses caused by mass produced goods from the consumer (user) to the manufacturer (producer). Commercial issues such as warranties (unsuitability for the purpose, failure to meet specifications), the liability of intermediaries (distributors, retailers), and damage to property are at the periphery of this inquiry and will not be considered. I also will not directly consider claims by third parties injured by the user, but the proposals to be discussed may extend to them by analogy.

Our first and very important task is to identify the central substantive policy which is addressed by the lawmakers in this field. While there is no question that safety is a positive good, it is equally obvious that safety constitutes a cost of production. Safety is costly because it uses up resources and reduces availability. Fewer people will be able to afford a more expensive product. Also, in some instances the safety obligations may become so great, given the state of the art and the expected liabilities, that it would not be economically feasible to make a product such as a vaccine.

Drawing and maintaining the optimal safety line requires a cost-benefit analysis which considers the socioeconomic and technological conditions and the prevailing ethic in the particular society.<sup>54</sup> Account must be taken on the one hand of the availability and cost of the material and human resources and of the degree of technological advancement that relate to the making of a particular product. On the other hand, account must be taken of the value of the losses in life, limb, pain, and suffering caused as an incidence of the use of such product. Furthermore, collateral justice issues such as the defenses of comparative versus contributory negligence and assumption of the risk and market share liability need to be addressed. After the basic policy decisions are made, the legal rules will have to be fashioned to maximize

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49. See *infra* Appendix pp. 592-93.

50. See *id.* at 593.

51. See *id.* at 590-91.

52. See *id.* at 592.

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54. For a fuller exploration of these aspects of products liability law, see A. Polinsky, *An Introduction to Law and Economics*, 95-104 (1983); Symposium, *Products Liability: Economic Analysis and the Law*, 38 U. CHI. L. REV. 1 (1970); Klevorick, *Legal Theory and the Economic Analysis of Torts and Crimes*, 85 COLUM. L. REV. 905, 911-16 (1985); Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

conformity with the line drawn. For example, imposing on a manufacturer a strict duty to warn or else pay for all avoidable consequences may produce a gain where the method of compliance chosen is relatively inexpensive and the preventable losses considerable, but not otherwise. Recognizing this state of the art defense encourages production of those goods which should be available in the market because their overall benefits outweigh the risks. The latter can be reduced through the duty to warn. Injecting into the defective product definition considerations of economic efficiency, especially narrowing the design defect category, significantly reduces the cost of production and, presumably, the cost of the product in a competitive market. Consumer choice is maximized when the manufacturer is required to offer and disclose the availability of super safety options at extra cost. Statutes of repose and rules limiting or capping recoveries also produce eventual cost savings.

Because the line cannot be drawn at perfect safety, the liability rules determine what incentives to create and where to place the losses. Since the usual choice is for the losses to be borne principally by those who benefit from the particular productive activity (and not by the public through taxes, subsidies, or welfare), the main question is how much to shift them, if at all, from the users to the producers and, through the latter, to the investors and ultimately to the general population of users. Strict liability even with exceptions for intentional misuse, patent defect, or improper use produces maximum shift. Liability only for recklessness and beyond works in the opposite manner. Obviously, the decision of whether and what to shift is motivated not only by compensatory and ethical considerations, but also by concerns about deterrence (punitive damages), practicability, administrative efficiency, and, last but not least, the effects of insurance on the distribution.

This thumb-nail sketch should convince us that products liability, a subject of major current concern in the world, is a complex and difficult field for choice of law analysis. There is little question in my mind that where production and distribution are national or international, the proper legislating unit should be of the same dimension, and a uniform national<sup>55</sup> or international private law is needed for those situations. In the absence of uniform laws applicable to unitary markets, however, we must face the unpalatable task of devising conflicts solutions which cannot be but somewhat artificial because the existence of more than one substantive rule is itself

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55. A major effort has been mounted in recent years to enact a federal "Product Liability Act" which would preempt the field in interstate commerce. See Mitts, *The Products Liability Crisis: A Federal Statutory Solution*, 1983 U. IL. L. REV. 757; Schwartz & Bares, *Federal Reform of Product Liability Law: A Solution That Will Work*, 13 CAP. U.L. REV. 351 (1983). The latest version of this Act, S. 100, 99th Cong., 1st Sess. (1985), was introduced in the Senate on January 3, 1985, and was referred again to the Committee on Commerce, Science, and Transportation. It is to be noted that in no version of this statute was there any reference to the spatial and personal scope of its provisions, that is to the choice of law issue, in the international sphere. Perhaps the drafters followed the pattern of other federal regulatory legislation whose extraterritoriality is determined under the principles of the Restatement of the Foreign Relations Law of the United States. No notice was apparently taken of the basic difference between regulatory and private law. In applying this Act, if it is ever enacted, the federal courts will be required to develop a federal law of conflicts.

The European Economic Community recently adopted a Directive requiring the member states (France, Germany, Italy, Belgium, Netherlands, Luxembourg, United Kingdom, Denmark, Ireland, Greece, Spain, and Portugal) to introduce a strict liability system by 1988, but the state of the art defense may be retained and a cap on recovery may be imposed. See COMMON MKT. REP. (CCH) ¶¶ 10,706 and 10,732 (1985). This could reduce, but is unlikely to eliminate, differences in the substantive law of the member states.

unnatural. In this context, the internal delicate balance of the policy compromises involved in products liability law requires that everything possible should be done to choose a single certain law to govern each claim in its entirety. In this spirit, the comprehensive scope of Article 8 of the Hague Convention<sup>56</sup> should be applauded.

In evaluating the various points of contact, I was struck by the importance, for choice of law purposes, of the place of distribution or marketing of the product. Planning and production are preliminary steps to distribution. The product does not cause harm until it is acquired by the user. Whether the manufacturer sells directly or indirectly through distributors, wholesalers, and retailers, he normally knows the intended market and his actions are and should be tailored to meet its exigencies.<sup>57</sup> The state of distribution is best positioned to apply its own sense of proper balance of the cost-benefit considerations. Since the product serves that market, it is the conditions there that determine its competitiveness.<sup>58</sup> Any unilateral subsequent action by the user, for example taking the product to another state where the harm occurs, should not bind the manufacturer. Which distribution should count for products which are marketed nationally or internationally, in more than one state or nation? The above analysis would support choosing the place where the particular product was acquired, which means where the manufacturer, in fact, met the user.

The defendant cannot claim arbitrariness since he intentionally directed his related commercial activity to that market. The same goes for the victim who knowingly acquired the product in that market. The state of distribution connects the manufacturer with the user. It is very probable that such state also will be the home state of the victim and the state of the injury (users normally buy and use at home). Thus, both the passive personality and the territorial criteria are met. The law of the state of distribution could be applied singly or, for those who prefer fuller articulation

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56. See *infra* Appendix pp. 591.

57. This notion was eloquently expressed in a recent case involving contraceptives:

Questions as to the *safety* of drugs marketed in a foreign country are properly the concern of that country; the courts of the United States are ill-equipped to set a standard of product safety for drugs sold in other countries. The issues raised here concern the knowledge, if any, of an allegedly unreasonable risk, and the sufficiency of the warning of that risk to users of the product. . . . This balancing of the overall benefits to be derived from a product's use with the risk of harm associated with that use is peculiarly suited to a forum of the country in which the product is to be used. Each country has its own legitimate concerns and its own unique needs which must be factored into its process of weighing the drug's merits, and which will tip the balance for it one way or the other. The United States should not impose its own view of the safety, warning, and duty of care required of drugs sold in the United States upon a foreign country when those same drugs are sold in that country . . . .

The impropriety of such an approach would be even more clearly seen if the foreign country involved was, for example, India [rather than England], a country with a vastly different standard of living, wealth, resources, level of health care and services, values, morals and beliefs than our own. Most significantly, our two societies must deal with entirely different and highly complex problems of population growth and control. . . . India may, in balancing the pros and cons of a drug's use, give different weight to various factors than would our society, and more easily conclude that any risks associated with the use of a particular oral contraceptive are far outweighed by its overall benefits to India and its people. Should we impose our standards upon them in spite of such differences? We think not.

Furthermore, *fairness to the defendant* mandates that defendant's conduct be judged by the standards of the community affected by its actions.

Harrison v. Wyeth Laboratories, 510 F. Supp. 1, 4-5 (E.D. Pa. 1980). See also *Bewers v. American Home Products*, 99 A.D.2d 949, 950, 472 N.Y.S.2d 637, 639 (1984); *Jones v. Searle Laboratories*, 93 Ill. 2d 366, 376, 444 N.E.2d 157, 161 (1983).

58. Furthermore, holding imported products to a stricter standard than domestic ones would probably violate the nondiscrimination obligation contained in Article III of the General Agreement for Tariffs and Trade.

rather than surrogation, when reinforced by the home state of the plaintiff and/or the place of injury.

The five conflicts texts for products liability take into account a multiplicity of contacts in various hierarchial orders reflecting jurisdictional or substantive (pro-plaintiff or better law) preferences as modified by certain pro-defendant exonerations. On their face, these texts do not articulate the overriding importance of the law of the state of distribution, but a more careful study of the practical operation of their rules shows how significant it is in most instances. Under most of these texts, the law of the place of distribution provides a major defense to the manufacturer who can trump the otherwise applicable law of another state if the availability of the product there was not foreseeable. Also, the law of the state of distribution can often be chosen by the victim. The end result is that this law plays a major role in making the choice of law decision.

Let us examine how the relevant provisions of the five texts actually work. Article 7 of the Hague Convention<sup>59</sup> provides that a manufacturer shall not be held liable under the laws of the state of injury or of the victim's habitual residence, which may be otherwise applicable, if "he could not reasonably have foreseen that the product or his own products of the same type would be made available [there] through commercial channels."<sup>60</sup> What happens then? The only other law left to be applied (Article 6) is that of the principal place of business of the manufacturer, namely the defendant's personal law.<sup>61</sup> In addition, Article 9 states that the application of another law shall not "preclude consideration being given to the rules of conduct and safety prevailing in the State where the product was introduced into the market."<sup>62</sup> This is an ambiguous provision, but a broad and pro-claimant reading of it<sup>63</sup> would enable the plaintiff to choose such law at his discretion regardless of where the other contacts lie. It stands to reason that if the law of the state of distribution may be used either as a shield by the manufacturer or as a sword by the victim, then it constitutes the principal connecting factor under the Hague Convention, and its centrality should be explicitly so recognized and brought out by redrafting the text to conform to the operative realities.

The Weintraub Rules (I)(A) and (I)(C)2,<sup>64</sup> with some qualifications, reach the same result and are even more explicit in accepting the offensive use of the law of the state of distribution if combined with plaintiff's habitual residence or if plaintiff elects it either when another law is not applicable ((I)(C)2) or for issues of punitive damages ((II)).<sup>65</sup>

Paragraph (c) of the Cavers Principle,<sup>66</sup> in the same spirit but more limited in its reach, allows the producer to veto the application of the law of any state where the

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59. See *infra* Appendix pp. 591.

60. *Id.*

61. *Id.*

62. *Id.*

63. See Cavers, *The Proper Law of Producer's Liability*, 26 *INT'L & COMP. L.Q.* 703, 725 (1977).

64. See *infra* Appendix pp. 592-93.

65. *Id.* at 593.

66. See *id.* at 592.



presence of the product was not reasonably foreseeable.<sup>67</sup> Mere presence rather than distribution through commercial channels, as in Article 7 of the Hague Convention, suffices. Although there is no direct provision for offensive use, the law of the place of acquisition (often the same as that of distribution) coupled with one more contact may also be chosen by the victim under Paragraph (b) of the Cavers Principle.<sup>68</sup>

Also limited is Article 131(b)(1)(b) of the Swiss Draft<sup>69</sup> which protects the manufacturer from the law of the state of acquisition if it can be shown that the product was placed in that market without his consent.<sup>70</sup> The plaintiff, however, may always choose the law of the state of the manufacturer's business according to Article 131(b)(1)(a).<sup>71</sup>

The importance of where the product is distributed emerges even more clearly when measured against the relative insignificance of the other contacts. For example, it should be recognized that the law of plaintiff's home state, which figures so prominently in the various texts, plays a subordinate role. While the loss is likely to come to rest there, and, therefore, its standards of compensatory recovery are relevant, the fact that the plaintiff needs support does not mean that it is this particular defendant that should provide it. Mere foreseeability that his product may be used anywhere in the world is not a sufficient link with the defendant. Furthermore, there is merit to the notion that there should be, if at all possible, unity of regulation of a particular market and that the claims of all persons injured by the same products should be treated in a uniform manner and not depend on where each plaintiff resides.<sup>72</sup> For similar reasons, defendant's home state or principal place of business, if not the same as the place of production or distribution, should be given an even more inferior status.

Even the combination of plaintiff's and defendant's home states should not by itself override the place of distribution. Products liability, with its connections with costs and benefits in particular markets, is a suitable terrain for downgrading the notion that the home state of all the parties has an indefeasible claim to control everything the parties do elsewhere. Furthermore, the presence of additional connections such as the place of acquisition or of harm should not automatically override the place of distribution in a manner reminiscent of contact counting.<sup>73</sup>

I have misgivings about a pro-plaintiff principle of compensation in products liability precisely because of an awareness that the safety line cannot reflect but a delicate balance between determinate competing values. Why should such balance be

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. See *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975).

73. Thus, I question the soundness of (1) those provisions in Article 5 of the Hague Convention where the law of the plaintiff's habitual residence and defendant's principal place of business override the law of the state of distribution-acquisition; (2) part (b) of Cavers' Principle which enables the plaintiff to select the law of his habitual residence if it coincides with the place of acquisition or harm; (3) Article 131(b)(1)(a) of the Swiss Draft which gives the plaintiff a generalized option to choose the law of defendant's place of business; (4) Weintraub Rule I(B) which grants a reverse option to the defendant and a similar but subordinated option to the plaintiff; and (5) Juenger (d) which favors the law of the home state of the parties.

upset in a direction favoring one party when the case is also somewhat connected with his state? Perhaps it will be argued that manufacturers engaged in interstate and international distribution cover their insurance risks by reference to the entire market. Since it is not known ahead of time where the connecting factors will materialize and which law will apply, manufacturers have no reason to complain if a pro-compensation rule receives favorable treatment. Manufacturers supposedly are not harmed by this practice because premiums are set uniformly and should not be significantly affected by the choice of law rules.<sup>74</sup> I am skeptical about this argument. I cannot understand how the premiums, at least in the long run, will fail to reflect the higher overall incidence of awards against manufacturers under a procompensation conflicts system.<sup>75</sup> Such extra burden can be justified only if one were to infuse the choice of law process with a supersubstantive purpose favoring distribution of losses over the entire insurance population of the world regardless of markets and what the otherwise applicable law would have provided. For no-fault automobile reparations, I sought to devise an ingenious insurance system to give both plaintiffs and defendants their home law and still not increase the premiums. This was to be achieved by reducing some awards while increasing others. Perhaps the Weintraub rules have an element of this. However, in no-fault insurance we are not facing the problems of products liability in which the calculations bring to the forefront the primacy of the law of the state of distribution.

The three other factors which appear in these texts are inferior to the preceding ones, if significant at all. First, I have difficulty seeing why the place of manufacture or design (Cavers (a))<sup>76</sup> and Weintraub Rule (C)(3))<sup>77</sup> is important. Manufacturers often make in a single place products having different features as required by the exigencies of their various markets. Certainly the mere making of a dangerous product is not itself dangerous. If such product is intended to be distributed in another market, it is there that its attributes and its cost-safety features should be judged. Only where overwhelming ethical considerations are at stake may the state of production perhaps legitimately interfere. Second, place of injury (Hague Articles 4 and 6,<sup>78</sup> Cavers (b) and (c),<sup>79</sup> and Juenger (a))<sup>80</sup> reflects, I presume, either a traditional approach or an interest in providing a fund for the benefit of local suppliers of medical and other services. In either case, I am not persuaded that the place of injury, which should be deemed fortuitous if unconnected with the place of marketing and acquisition of the product, should prevail. Even if it happens to be plaintiff's own home state, its

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74. R. WEINTRAUB, *supra* note 8, at 272; Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 560–79 (1961).

75. Cf. *DeFoor v. Lematta*, 249 Or. 116, 121, 437 P.2d 107, 109 (1968); *Miller v. Miller*, 22 N.Y.2d 12, 21, 237 N.E.2d 877, 882, 290 N.Y.S.2d 734, 741 (1968). See also Ehrenzweig, *Parental Immunity in the Conflict of Laws: Law and Reason Versus the Restatement*, 23 U. CHI. L. REV. 474, 477–78 (1956).

This writer just experienced a brusque reminder of the truth of this proposition. On the heels of the abolition of interfamily tort immunity by the Supreme Court of Ohio, his insurer, J.C. Penney Insurance Company, amended its policies to exclude liability coverage for claims by family members!

76. See *infra* Appendix pp. 592.

77. See *id.* at 593.

78. See *id.* at 590–91.

79. See *id.* at 592.

80. See *id.* at 593.

predominance should not be accepted unless we are willing to buy the proposition that foreseeability of use alone is sufficient to impose a state's standards on out of state production and distribution. In this respect, both the Weintraub Rules and the Swiss Draft should be praised for leaving the place of injury totally out. Third, place of acquisition, if not in a market where the products are regularly distributed, is again fortuitous and transactionally unrelated to the producer. Finally, the preference for modern standards of products liability regardless of the place of production, distribution, and acquisition, as proposed by Professor Juenger,<sup>81</sup> is not acceptable because of vagueness and incompatibility with the conflicts function as already explained.<sup>82</sup>

In conclusion, I advocate the supremacy of the law of the state where the particular product was placed in the market. In the usual case, it will be the state where the product was acquired by the user from the manufacturer or an authorized intermediary and was actually used. The Hague and Weintraub texts should be praised for using this law in a substantial number of contexts, but unfortunately the two texts unnecessarily complicate matters by setting up constellations of other contacts as superior, and by awarding plaintiffs and defendants options to make choices which are not persuasively justified. The Cavers and Swiss texts do not go far enough in the right direction and suffer from the same systemic and option-based weaknesses. Professor Juenger goes his own way which is not consistent with the position taken here. For those who are uncomfortable with a single-factor system and insist on recognizing some exceptions, perhaps the law of the place of distribution should be overridden in the rare situations where most other connections are clustered in another state, for example where the particular product was acquired by plaintiff at home from a nonauthorized person where the injury also occurs.

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81. See Juenger, *What Now?*, *supra* note 5, at 521.

82. See *supra* pp. 469-72. For the position that changes in products liability law should be made directly rather than through manipulation of the conflicts process, see Comment, *Choice-of-Law in Minnesota Corporate Successor Products Liability: Which Rule is the Better Rule?*, 8 *HAMLINE L. REV.* 373, 408-09 (1985).

## APPENDIX

RESULTS OF A POLL AMONG CONFLICTS TEACHERS ON CHOICE OF LAW FOR  
PRODUCTS LIABILITY

In May 1985, I wrote to about 200 conflicts teachers stressing the importance of choice of law in products liability and asking them to vote their preferences, on a scale of one (best) to five (worst), among the five texts which are reproduced at the end of this Appendix. Opportunity for comment was also provided. I received twenty-nine responses specific enough to be included in the calculation of the results of this poll. Most of the responses evaluated all of the proposals using all the numbers between one and five. The Cavers Principle had the best score (54) followed by Weintraub's Rules (64), the Hague Convention (77), the Swiss Draft (84), and the Juenger Alternative (104). Weintraub's Rules had the "highest best-lowest worst" combination ( $8 - 1 = 7$ ), followed by the Cavers Principle ( $6 - 0 = 6$ ), the Hague Convention ( $7 - 4 = 3$ ), the Swiss Draft ( $4 - 4 = 0$ ), and the Juenger Alternative ( $4 - 14 = -10$ ).

Excerpts from the specific comments and suggestions for change on these texts are summarized below.

## Hague Convention

*Comments:* 1) The variable factors are good. 2) Article 9 produces undesirable ambiguity. 3) It does not favor plaintiffs enough. 4) There is a fair balance of all interests. 5) It provides fairness plus certainty. 6) It gives guidance on collateral issues. 7) It is well drafted, predictable, and provides substantive solutions.

*Suggestions:* 1) Make Article 7 (foreseeability by manufacturer) the overriding principle; exclude place of injury. 2) Focus on the transaction that brought the product to the victim.

## Cavers Principle

*Comments:* 1) It combines flexibility with guidance. 2) It incorporates principles of interest analysis. 3) It is outrageously claimant oriented. 4) It is unduly concerned about introduction of substantive rules in choice of law. 5) It is reasonably specific and suitable for multiparty, multiresident situations.

*Suggestions:* 1) Add specific examples of application. 2) Reconsider the aspect concerning punitive damages.

## Swiss Draft

*Comments:* 1) It lays down a firm rule, facilitates decision, and favors recovery. 2) Limiting damages under Swiss law is wrong in principle. 3) It is fair and allows plaintiff reasonable choices. 4) It is simple and direct.

*Suggestions:* 1) Expand plaintiff's choices to include place of manufacture or design and plaintiff residence if availability is foreseeable.

## Weintraub Rules

*Comments:* 1) It is consistent with interest analysis. 2) It accurately measures loss and conforms to party expectations. 3) Rules 1(A) and (B) may do injustice to visitors to the United States or migratory citizens of backward states. 4) It is consistent with party expectations and easy to apply. 5) It combines predictability with fairness. 6) It improperly limits plaintiff to the law of his state. 7) It is simple and straightforward. 8) It is even-handed. 9) Defendant's option makes no sense. 10) It is clear and comprehensive. 11) It is thoughtful and pragmatic.

*Suggestions:* 1) Give greater weight to place of manufacture and place of distribution. 2) Adopt the foreseeability version of the Hague Convention. 3) Drop Rule I(B); be more generous in punitive damages.

## Juenger Alternative

*Comments:* 1) It leaves courts groping. 2) It provides maximum flexibility to reach a just result; there is no undue emphasis on defendant's expectations. 3) A court can do anything it pleases and is thus likely to choose *lex fori*. 4) It gives a laundry list without indication of relative importance. 5) It makes it difficult for a court to decide the question. 6) It has all the weaknesses of the Second Restatement and none of its strengths. 7) It is a nonapproach. 8) It provides a simple and clear functional selection. 9) It looks good, but says nothing. 10) It provides for untrammelled judicial legislation.

*Suggestions:* 1) Articulate a pro-plaintiff choice and expressly downgrade foreseeability by manufacturer. 2) Add foreseeability to place of acquisition in (C).

The names of the respondents (minus one that I had difficulty in deciphering) are as follows: J. P. Bauer; E. Bodenheimer; B. M. Carl; D. F. Cavers; J. Davies; J. Dellapenna; A. K. Easley; J. Guendelsberger; P. Herzog; P. Holmes; F. Juenger; P. J. Kozyris; R. Lee; J. J. McAuley; J. Martin; A. Murphey, Jr.; J. A. Nafziger; R. E. O'Toole; M. A. Pock; W. L. M. Reese; R. L. Seaver; G. R. Shreve; D. D. Stern; V. Stone; L. D. Wardle; L. Weinberg; R. Weintraub; J. Yeager.

Most respondents worked within the proffered alternatives, but did not feel totally bound by them. A couple of respondents expressed strong objections to having any rules. One respondent went the other way, suggesting that "anyone who cannot find one of these better than the others is hung up on her or his own solution and ought to be forced to write an article for the Symposium!"

## HAGUE CONVENTION ON THE LAW APPLICABLE TO PRODUCTS LIABILITY

## Article 1

This Convention shall determine the law applicable to the liability of the manufacturers and other persons specified in Article 3 for damage caused by a product, including damage in consequence of a misdescription of the product or of a failure to give adequate notice of its qualities, its characteristics or its method of use.

Where the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable, the Convention shall not apply to their liability *inter se*.

This Convention shall apply irrespective of the nature of the proceedings.

## Article 2

For the purpose of this Convention—

- a. the word ‘product’ shall include natural and industrial products, whether new or manufactured and whether movable or immovable;
- b. the word ‘damage’ shall mean injury to the person or damage to property as well as economic loss; however, damage to the product itself and the consequential economic loss shall be excluded unless associated with other damage;
- c. the word ‘person’ shall refer to a legal person as well as to a natural person.

## Article 3

This Convention shall apply to the liability of the following persons—

1. manufacturers of a finished product or of a component part;
2. producers of a natural product;
3. suppliers of a product;
4. other persons, including repairers and warehousemen, in the commercial chain of preparation or distribution of a product.

It shall also apply to the liability of the agents or employees of the persons specified above.

## Article 4

The applicable law shall be the internal law of the State of the place of injury, if that State is also—

- a. the place of the habitual residence of the person directly suffering damage, or
- b. the principal place of business of the person claimed to be liable, or
- c. the place where the product was acquired by the person directly suffering damage.

## Article 5

Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also—

- a. the principal place of business of the person claimed to be liable, or
- b. the place where the product was acquired by the person directly suffering damage.

## Article 6

Where neither of the laws designated in Articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury.

## Article 7

Neither the law of the State of the place of injury nor the law of the State of the habitual residence of the person directly suffering damage shall be applicable by virtue of Articles 4, 5 and 6 if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels.

## Article 8

The law applicable under this Convention shall determine, in particular—

1. the basis and extent of liability;
2. the grounds for exemption from liability, any limitation of liability and any division of liability;
3. the kinds of damages for which compensation may be due;
4. the form of compensation and its extent;
5. the question whether a right to damages may be assigned or inherited;
6. the persons who may claim damages in their own right;
7. the liability of a principal for the acts of his agent or of an employer for the acts of his employee;
8. the burden of proof in so far as the rules of the applicable law in respect thereof pertain to the law of liability;
9. rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

## Article 9

The application of Articles 4, 5 and 6 shall not preclude consideration being given to the rules of conduct and safety prevailing in the State where the product was introduced into the market.

## CAVERS' PRINCIPLE OF PREFERENCE

(a) Where a person claims compensation from the producer of a defective product for harm it caused to the claimant or his property, the claimant should be entitled to the protection of the liability laws of the State where the defective product was produced (or where its defective design was approved).

(b) If, however, the claimant considers the liability laws of that State (i) less protective than the laws of the claimant's habitual residence where either he had acquired the product or it had caused harm or (ii) less protective than the laws of the State where the claimant had acquired the product and it had caused harm, then the claimant should be entitled to base his claim on whichever of those two States' liability laws would be applicable to his case.

(c) The claimant, however, should not be entitled to base his claim on the laws of one of the States specified in the preceding paragraph if the producer establishes that he could not reasonably have foreseen the presence in that State of his product which caused harm to the claimant or his property.

## SWISS DRAFT

## Art. 131

## (b) Product Liability

1. Claims based on a defect in or defective descriptions of a product are governed, at the choice of the injured party,

(a) by the law of the state in which the tortfeasor has his place of business or, if he has no place of business, his habitual residence;

(b) by the law of the state where the product was acquired, unless the tortfeasor can prove that the product has been put on the market in that state without his consent.

2. If a claim based on a defect in or defective description of a product is governed by foreign law one cannot recover greater damages in Switzerland than would be awarded for such damage under Swiss law.

3. Art. 129(3) of the present law applies when the illegal act constitutes the violation of a pre-existing legal relationship between the tortfeasor and the injured party, claims founded on this act are governed by the law applicable to such legal relationship.

## WEINTRAUB'S CHOICE OF LAW RULE FOR PRODUCTS LIABILITY

(I) To determine whether plaintiff will be compensated and the extent of compensation for actual damages:

(A) Apply the law of plaintiff's habitual residence if the product that caused the harm or products of the same type are available there through commercial channels and the defendant should have foreseen this availability.

(B) If the law of plaintiff's habitual residence is not available under rule I(A), the defendant may nevertheless choose that law.



(C) If the law of plaintiff's habitual residence is not applied under rules I(A) or I(B), the plaintiff may elect the law of any of the following places:

1. the defendant's principal place of business;
2. where the product was acquired, if the defendant should have foreseen its availability there through commercial channels;
3. where the defendant manufactured, designed, or maintained the product or any of its component parts.

(II) On issues affecting the availability and measurement of punitive damages, the plaintiff may elect the law of any of the places designated in rule I(C).

#### JUENGER'S ALTERNATIVE

In selecting the rule applicable to any issue presented by a multistate products liability claim, the court will take into account the laws of the following jurisdictions:

- (a) The place where the injury occurred,
- (b) The place where the conduct causing the injury occurred,
- (c) The place where the product was acquired, and
- (d) The home state (habitual residence, place of incorporation and principal place of business) of the parties.

As to each issue, the court shall select from the laws of these jurisdictions that rule of decision which most closely accords with modern standards of products liability.

